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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34054

Morristown & Erie Railway, Inc.
Modified Certificate

PETITION OF FIVE NEW JERSEY MUNICIPALITIES TO REOPEN

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**UNION COUNTY REPLY TO SUPPLEMENT TO PETITION TO REOPEN**





Respectfully submitted,

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Dated: May 11, 2004

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## I.
## INTRODUCTION

On April 29, 2004, the five Municipalities of Springfield, Summit, Kenilworth, Roselle, and Roselle Park ("the Petitioners" or "the Five Municipalities") filed a Supplement to the Petition to Reopen ("the Supplement") they previously filed with the Board on January 2, 2004. Union County, NJ ("Union County") manager of this rail project submits this Reply in opposition.

The alleged basis for Petitioners' Supplement is to bring to the Board's attention the potential effect on the subject rail line of a Board decision in an unrelated proceeding issued on January 21, 2004 ("the January 21 Decision"), another unrelated proceeding for a declaratory order involving solid waste movements from Staten Island, and a statement made by a

Union County representative at the Board's April 2, 2004, Conrail oversight hearing. Nothing in this Supplement adds anything to the nonexistent basis for reopening that the Five Municipalities had offered in their original Petition. Moreover, Petitioners fail to show why they could not have filed these comments at an earlier date, either in late January, 2004, or after the April 2, 2004, hearing. Union County surmises that this Supplement is Petitioners' latest tactic to delay the restoration of rail service over the subject properties. The Board should reject this Supplement and the original Petition as untimely and lacking merit.

## II.
## BACKGROUND

As the Board will recall, this proceeding concerns two rail lines[1] formerly owned by the Staten Island Railway ("SIRY") and the Raritan Valley Railroad ("RVRR"), which were abandoned by their respective railroads and subsequently acquired by the State of New Jersey's Department of Transportation ("NJDOT"). Thereafter, NJDOT and Union County entered into an agreement whereby NJDOT granted Union County a right of entry for, in the Agreement's words, "the purposes of rehabilitating the railroad, track, structures, and right-of-way for the subsequent re-

[1] The subject lines extend from a point west of the New Jersey Turnpike in Linden, NJ, to the junction of the former Staten Island Railway line with N.J. Transit's Raritan Valley Line in Cranford, NJ and from the Raritan Valley Line in Cranford to a junction with N.J. Transit's Morris and Essex Line in Summit, NJ.

establishment of rail service on the property." Union County selected the Morristown & Erie Railway, Inc. ("M&E") as its class III short line railroad operator. M&E and Union County signed an Operating Agreement on May 9, 2002. On July 5, 2002, the STB served a decision granting M&E's application for a Modified Certificate of Public Convenience and Necessity which Petitioners challenge here.

Seeking to prevent a resumption of rail service over this light density line, the Five Municipalities unsuccessfully challenged this action before both the Union County Board of Chosen Freeholders and the New Jersey Superior Court. The Board of Chosen Freeholders issued a resolution (No. 633-20) at an open meeting held at 7PM on June 5, 2003, with ample and vigorous participation by all members of the public including representatives of the Five Municipalities, approving commencement of rail service. After Superior Court Judge Edward Beglin issued a bench ruling on December 5, 2003, denying most of Petitioners' relief, the Five Municipalities filed this Petition to Reopen with the Board on January 2, 2004.

The Five Municipalities now supplement that Petition offering the following three additional developments as further bases for reopening: (1) the Board's January 21 Decision granting the Port of New York and New Jersey's ("Port Authority") Petition for a Declaratory Order, finding that Port Authority's proposed

construction of and operation over a connection between the Staten Island Railway's line and the Chemical Coast Secondary Lines of Norfolk Southern Railway Company, CSX Transportation, Inc., and Consolidated Rail Corporation does not constitute "an extension" of a line of railroad requiring Board approval;[2] (2) a pending proceeding for declaratory relief initiated at the Board by the New York City Economic Development Corporation ("NYCEDC") in FD No. 34426;[3] and (3) testimony[4] given by Union County representative James Daley at the Board's April 2, 2004, hearing in the Conrail Oversight proceeding. Significantly, the Five Municipalities either neglected or declined to participate in both of these declaratory relief proceedings to protect its interest.

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[2] The basis for the Board's finding is that this construction would merely replace float bridge operations that formerly connected these rail lines. See, January 21 Decision at 5.

[3] There the NYCEDC seeks a ruling that its proposal to build new track and rehabilitate former SIRY trackage serving a New York City municipal waste transfer facility is exempt from Board licensing and environmental review.

[4] Petitioners suggest that Mr. Daley's testimony presents further justification for imposing substantial environmental conditions on M&E's Modified Certificate authority. Petitioners summarized Union County's presentation as follows:

- The County is working with M&E to offer intermodal service to businesses located on the Rahway Valley and Staten Island Railroad corridors
- The Port of New York/New Jersey is expected to double its business between 2002 and 2010
- The County is working to move a greater portion of this traffic by rail
- Short line operators such as M&E should be able to access traffic directly at yards and interchange points operated by Conrail

Five Municipalities' Supplement to Petition at 3.

## III.
## ARGUMENT

The Board should reject Petitioners' latest missive as untimely and lacking merit. As a preliminary matter, counsel as experienced as Petitioners' knows that replies must be filed within 20 days of the date a pleading is submitted to the Board. Moreover, petitions challenging Board actions must be filed within a limited amount of time from the date the action was taken, typically either 10 or 20 days. See generally, 49 CFR 1104.13 and 1115. While Petitioners' Supplement is styled as neither a reply to a pleading nor any sort of appeal to the January 21 Decision, it is not a timely filing under 49 CFR 1104.6 and should be rejected for that reason alone. Moreover, there is no reason why Petitioners could not have raised these arguments by filing timely comments in either FD No. 34426 or 34428 or within 20 days of Union County's April 2 testimony[5] and Petitioners offer no explanation for their delay. One can only surmise that the Supplement is the latest effort at delay.

Substantively, the Board should reject Petitioners' "Supplement" for failure to satisfy the requirements for a Petition to Reopen. The Board's Rules of Practice provide that a party may "file a petition to reopen an administratively final decision of the Board pursuant to the requirements of 49 CFR

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[5] Union County filed its written comments with the Board on March 29, 2004.

1115.3(c) and (d)... stating in detail the respects in which this proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination." 49 CFR 1115.4. Petitioners base their reopening request on an allegation of "changed circumstances." As discussed at length in the prior filings by both Union County and M&E, Petitioners' arguments lack merit. Moreover, Petitioners have failed to sustain their burden of proof to support the requested imposition of environmental conditions.

On several different occasions the Board has articulated its regulatory threshold for imposing environmental conditions. The Board's environmental reporting regulations at 49 CFR 1105.6 require preparation of an Environmental Assessment for an acquisition, lease, or operation under 49 U.S.C. 10901 if it will result in either (1) operational changes that would exceed any of the thresholds established in sec. 1105.7(e) or (2) or an action that would normally require environmental documentation such as a construction or abandonment and <u>do</u> <u>not</u> [emphasis supplied] require documentation for an acquisition, lease, or operation transaction that does not meet those thresholds. The amount of traffic the line would handle falls

far short of the STB's threshold[6] for imposing any sort of environmental relief such as that requested by Petitioners. In FD No. 33508, Missouri Central Railroad Company-Acquisition And Operation Exemption-Lines of Union Pacific Railroad Company, et al (decision served April 30, 1998, decision on reconsideration served September 14, 1999) the Board rejected positions from communities along the rail line similar to those asserted here by the Five Municipalities. See also, FD No. 33611, Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX (slip op. served August 21, 1998, at 5-8).[7]

Petitioners' request for relief should be rejected because it is both premature and speculative. In fact, Petitioners readily admit the speculativeness of the connection between the subject rail lines and those involved in FD Nos. 34426 and 34428. A few of the many examples should suffice:

- "Petitioners...file this supplement...to bring to the Board's attention the *potential effect*..." Supplement at 1.
- "Those decisions, filings, and statements raise the *specter* that the lines at issue here...*could* carry far more traffic, including environmentally sensitive traffic such as solid waste and lengthy intermodal traffic..." Id.

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[6] An increase in rail traffic or rail yard activity of at least 100 percent or a frequency of at least eight trains per day or, in the case of a nonattainment area, an increase in rail traffic of at least 50 percent (20 percent in rail yard activity) or a frequency of at least three trains per day. Union County is in a nonattainment air quality area.

[7] holding that the rehabilitation and restoration of an abandoned parallel rail line in order to double track a nearby active line does not constitute new construction subject to STB jurisdiction.

- "The Five Municipalities submit that the *potential...*" Id.
- *"On its face, nothing in the Port Authority decision authorizes a connection..."* Id. at 2.
- "The Port Authority petition makes clear that '[t]he revitalized SIRR *[SIRY] will not extend west of the New Jersey Turnpike...'"* Id. at 3.
- "Nonetheless, it is *possible* that the bridge connecting the portions of the SIRY controlled by the Port Authority immediately east of the New Jersey Turnpike and the portions of the SIRY controlled by Union County and M&E immediately west of the New Jersey Turnpike, *might be* reconstructed. Id. at 3.

Suffice it to say that Union County does not need to identify to the Board the location of each and every "might", "could," or "conceivable" in Petitioners' Supplement. The fact is that Petitioners have not shown any basis for imposing the requested conditions. Neither Union County nor the M&E have any control over the Port Authority's rail project nor the operation of the Chemical Coast Lines. Should some party eventually seek to construct a connection between the subject rail lines and the Chemical Coast Lines and Board authority be required for that connection, that would be time for the Board to determine whether and to what extent *any* environmental conditions should be imposed.

With regard to Petitioners' other requests, the Five Municipalities have asked (1) Union County and M&E to clarify on the record that they have no operating or other rights to reconnect to the lines of the former SIRY east and west of the New Jersey Turnpike, (2) that M&E should clarify whether it has plans [to move intermodal traffic from or to Howland Hook and to

rebuild the Cranford interchange], or is aware of plans, to do so, and (3) that M&E should state clearly and precisely that it will never attempt to make a connection with the portion of the SIRY east of the New Jersey Turnpike, or otherwise seek to acquire or move solid waste traffic from Staten Island. Union County has previously submitted for the record a copy of the May 9, 2002, Operating Agreement, which identifies all rail lines under its control. While the remaining portions of Petitioners' inquiry pertain just to M&E, Union County submits that there is no justification for Petitioners' fishing expedition. Moreover, Union County submits that the Board has no jurisdiction to prevent M&E from making a connection providing that it obtains the appropriate regulatory authority, to the extent required.

## IV.
## CONCLUSION

The Board should deny Five Municipalities' reopening request and put an end, once and for all, to this needless and costly litigation.

Respectfully submitted,

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Dated: May 11, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of May, 2004, the foregoing Union County Reply to Supplement to Petition Reopen, New Jersey was delivered, to the following:

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